

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR NOEL ROSARIO,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 236965

Ottawa Circuit Court

LC No. 00-023674-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals from his conviction of assault with intent to do great bodily harm less than murder, MCL 750.83, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to concurrent terms of 36 to 120 months' imprisonment for the assault and 60 to 240 months' imprisonment for the home invasion. We affirm.

I. Confession Transcript

Defendant argues that the trial court erred when it allowed transcripts of defendant's confession inside the jury room during deliberations because the trial court did not admit the transcripts into evidence. Defendant failed to preserve this issue by objecting before the trial court and, therefore, we review this claim under the plain error doctrine. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) the error affected substantial rights." *People v Watkins*, 247 Mich App 14, 28; 634 NW2d 370 (2001), citing *Carines*, *supra* at 763.

This Court has held that "a trial court is not to provide the jury with unadmitted evidence." *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), citing *People v Williams*, 179 Mich App 15, 22-23; 445 NW2d 894 (1989), rev'd on other grounds 434 Mich 894 (1990). While it appears that the trial court erred by inadvertently allowing the transcripts into the jury room, defendant has not demonstrated that the error affected the verdict. *Carines*, *supra*, 763. Indeed, any error was clearly harmless because defense counsel conceded that the transcript is accurate and the trial court permitted the jurors to follow along with the transcript while they listened to the tapes in court. Under the circumstances, there is little difference between playing the tape for the jury and allowing the jurors to read the transcript. Accordingly,

defendant has not shown that this error affected his substantial rights and, therefore, he has forfeited this issue.

## II. Sentence

We also reject defendant's claim that the trial court misscored certain offense variables (OV) at his sentencing hearing.

Defendant objected to the trial court's OV 3 score of twenty-five points for both the assault with intent to do great bodily harm and the home invasion convictions. Under MCL 777.33(1)(c), a score of twenty-five points is appropriate if "[l]ife threatening or permanent incapacitating injury occurred to a victim." Furthermore, under MCL 777.22(1) and (2), OV 3 should be scored for both crimes against a person and crimes against property.

" 'Scoring decisions for which there is any evidence in support will be upheld.' " *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Here, Dr. John Schram testified that the victim's injuries were life-threatening. The trial court's scoring decision was clearly supported by record evidence and, therefore, the trial court correctly scored OV 3.

Defendant asserts that the trial court also misscored OV 9. Defendant did not object to the scoring of OV 9 on count II at the sentencing hearing and, therefore, the issue is not preserved for appeal. We allow parties to challenge unpreserved scoring issues on appeal if the sentence is not within the appropriate guidelines range. *People v Kimble*, 252 Mich App 269, 276-277 n 5; 651 NW2d 798 (2002), lv granted \_\_\_ Mich \_\_\_; 659 NW2d 231 (2003). However, here, the trial court's minimum sentence of 60 months in prison on count II was well within the guidelines range of 51 to 85 months and, therefore, defendant's claim is forfeited. Nonetheless, OV 9 was properly scored at ten points on count II because four people were inside the apartment when defendant committed the home invasion. See MCL 777.39(1)(c) and (2)(a).

Finally, defendant contends that the trial court erred by scoring one point for OV 16. Defendant objected to the scoring at the sentencing hearing, but the trial court concluded that the damages met the minimum amount of \$200 for purposes of the guidelines scoring. Trial testimony clearly established that a door was broken from its hinges, a mattress was ruined and a phone line was "yanked . . . off the wall." Therefore, and because defendant's sentence was clearly within the minimum guidelines range, he is not entitled to resentencing. *Hornsby, supra* at 468; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Henry William Saad  
/s/ Patrick M. Meter  
/s/ Donald S. Owens